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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

11 DEL PATTERSON AND DOTTIE) Case No. 8:15-cv-01034-PSG (SSx)
12 PATTERSON,)
13) **NOTICE OF MOTION AND**
14 Plaintiffs,) **MOTION TO DISMISS**
15) **PLAINTIFFS' COMPLAINT FOR**
16 vs.) **FAILURE TO STATE A CLAIM**
17) **UPON WHICH RELIEF CAN BE**
18) **GRANTED**
19) **[FRCP Rule 12(b)(6)]**
20)
21 Defendants.) Date: October 19, 2015
22) Time: 1:30 p.m.
23) Ctrm: 880
24)
25) Complaint Filed: June 29, 2015
26)
27) *[Request for Judicial Notice filed*
28) *concurrently herewith]*

29 **TO THE CLERK OF THIS COURT AND ALL PARTIES AND**
30 **THEIR ATTORNEYS OF RECORD, IF ANY:**

31 **PLEASE TAKE NOTICE** that on October 19, 2015 at 1:30 p.m. in
32 Courtroom 880, of the above-entitled Court, located at 255 East Temple Street, Los
33 Angeles, California 90012, Defendants, WESTERN PROGRESSIVE, LLC and

1 OCWEN LOAN SERVICING, LLC (collectively “Defendants”), will move this
 2 court for an Order dismissing the Complaint (the “Complaint”) of Plaintiffs, DEL
 3 PATTERSON AND DOTTIE PATTERSON (collectively “Plaintiffs”) pursuant
 4 to Federal Rule of Civil Procedure (“FRCP”) Rule 12(b)(6) for the failure to state a
 5 claim upon which relief can be granted. This motion is made on the grounds that
 6 Plaintiffs have failed to plead the essential facts which give rise to their claims
 7 and/or the claims are barred on their face, as confirmed by matters which may be
 8 properly judicially noticed by this court.

9 This motion will be based upon this notice of motion and motion, the
 10 attached memorandum of points and authorities, the complete files and records in
 11 this action, the Request for Judicial Notice filed concurrently herewith, the oral
 12 argument of counsel and upon such other and further evidence as this court might
 13 deem proper.

14 Pursuant to Judge’s Standing Order, the morning of July 16, 2015,
 15 Defendants’ counsel left a telephonic voice mail message with Plaintiffs’ counsel
 16 to discuss the Motion and potential resolution. Receiving no return telephone call,
 17 at approximately 4:50p.m. on July 16, 2105, Defendant’s counsel wrote a detailed
 18 letter to Plaintiffs’ counsel setting forth all legal and factual issues and concerns
 19 with Plaintiffs’ complaint, and requesting they consider amendment. Because
 20 Plaintiffs have not responded to that letter, Defendants have been required to file
 21 this Motion in compliance with the deadlines set forth by Federal Rule of Civil
 22 Procedure, Rule 12.

23 Respectfully submitted,

24 **WRIGHT, FINLAY & ZAK, LLP**

25 Dated: July 24, 2015

By: /s/ Patricia L/ Penny

26 T. Robert Finlay, Esq.

27 Patricia L. Penny, Esq.

28 Attorneys for Defendant, WESTERN
 PROGRESSIVE, LLC and OCWEN
 LOAN SERVICING, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Like so many other complaints, Plaintiffs have brought this one attempting to stall a foreclosure sale of their real property. In this case, however, Plaintiffs have sued not once, but twice. They filed their first complaint in State Court on July 21, 2014 and dismissed that action without prejudice on June 10, 2015; just 5 days before the hearing on Defendants' Demurrer to their First Amended Complaint in State Court. On June 29, 2015, Plaintiffs filed this federal court action.

Plaintiffs' prior State Court Complaint provides the backdrop for their stall tactics. Plaintiffs have been in foreclosure for over three years, applied for loan modifications over six times, and, unfortunately, simply can no longer afford to stay in the real property.

This federal court action is premised on several identical arguments to their prior litigation. Plaintiffs continue to argue, without any standing to do so, that the Assignments to the relevant Deed of Trust are improper. Some of their theories appear based upon legal theories espoused in Glaski v. Bank of America, 218 Cal. App. 4th 1079 (5th App. Dist. 2013). Unfortunately for Plaintiffs, however, the holdings of that case, decided based upon New York Trust law, have NOT been followed by any California Courts of Appeal.

To bootstrap into federal court, they also erroneously assert that they have a private right of action under the Fair Credit Reporting Act and they allege statutorily precluded claims of Truth in Lending Act violations. As shown below, Plaintiffs cannot amend their Complaint with factual allegations or supporting viable law to state any claim for relief against Defendants. In short, Plaintiffs are blatantly forum shopping, such that this action should be dismissed without prejudice.

II. FACTUAL HISTORY, ALLEGATIONS AND ADMISSIONS

Plaintiffs own the real property located at 13152 Laburnum Drive, Tustin, California 92780 (the “Real Property”). (Complaint, page 2, lines 2 through 6; Request for Judicial Notice (“RJN”), Exhibits (“Ex.”) A, B and C.) In April 2006, Plaintiffs borrowed the sum of \$553,000.00 (the “Loan”) from Defendant Barrington Capital Corporation, a California Corporation (“Barrington”), signing an Adjustable Rate Note (the “Note”) evidencing the Loan (RJN, Ex. K, paragraph 20 and Ex. 1 attached thereto). As security for the Note, Plaintiffs also signed a Deed of Trust (the “Deed of Trust”), which recorded as a lien against the Real Property. (RJN, Ex. J, paragraph 28; RJN, Ex. D).

On February 27, 2007, Barrington caused to be recorded an Assignment of Deed of Trust assigning the Deed of Trust to Option One Mortgage Corporation, a California Corporation (“Option One”). (RJN, Ex. E). On May 15, 2013, Option One caused to be recorded an Assignment of Deed of Trust, assigning the Deed of Trust to Defendant WELLS FARGO BANK, N.A., a national association, as Trustee for OPTION MORTGAGE LOAN TRUST 2006-2, ASSET-BACKED CERTIFICATES, SERIES 2006-2 (“Wells Fargo”). (RJN, Ex. F). On December 26, 2013, Wells Fargo substituted Defendant WESTERN PROGRESSIVE, LLC (“Western”) as the Trustee of the Deed of Trust by a recorded Substitution of Trustee. (RJN, Ex. G). On January 28, 2014, Western caused to be recorded a Notice of Default and Election to Sell under the Deed of Trust (“NOD”), which NOD recites that Plaintiffs were in default on the Loan in an amount of \$54,277.91 as of January 21, 2014. (RJN, Ex. H). On May 29, 2014, Western caused to be recorded a Notice of Trustee’s Sale (“NOS”), originally setting the foreclosure sale of the Real Property for July 1, 2014. (RJN, Ex. I). The foreclosure sale is still pending.

In Plaintiffs’ previous lawsuit, they have admitted the following. In April 2009, they experienced financial difficulty, and applied for and obtained a “step

1 modification” of the Loan. (RJN, Ex. J, paragraph 56). Thereafter, they sought
 2 additional loan modifications on the Loan. (RTN, Ex. J, paragraph 57).
 3 Specifically, in December 2010, they submitted a loan modification application,
 4 but withdrew that application in April 2011. (RJN, Ex. J, paragraph 59(1)). In
 5 July 2012, they again were offered assistance on the Loan, and in or about March
 6 2013, Plaintiffs submitted another loan modification application. (RJN, Ex. J,
 7 paragraphs 59(2) and (3)). However, in June 2013, that loan modification
 8 application was denied. (RJN, Ex. J, paragraph 59(3), lines 4 through 5).
 9 Plaintiffs do not allege that they appealed that denial, pursuant to California Civil
 10 Code Section 2923.6.

11 Defendants previously demurred to the State Court Complaint, and on
 12 January 21, 2015, just 5 days before the January 26, 2015 hearing on that
 13 demurrer, Plaintiffs filed and served First Amended Complaint (“FAC”). (RJN,
 14 Ex. K and L). Defendants again demurred to the FAC, and on June 10, 2015,
 15 against just 5 days before the June 15, 2015 hearing set for that demurrer, Plaintiffs
 16 dismissed their State Court First Amended Complaint. (RJN, Ex. M). Defendants
 17 had also moved to expunge the recorded lis pendens in the State Court matter,
 18 which motion the State Court granted. (RJN, Exs. N and O). Plaintiffs have
 19 recorded a new Lis Pendens with this lawsuit. (RJN, Ex. P).

20 In this case, Plaintiffs make nearly identical allegations to their State Court
 21 lawsuit; to wit: (1) that the Assignments of Deed of Trust and Note are void
 22 (Compare, e.g., Complaint, paragraphs 2 through 43 and RJN, Ex. J, paragraphs 18
 23 through 55; RJN, Ex., K, paragraphs 17 through 54). The Complaint also alleges
 24 Plaintiffs wrote demanding verification of “declaration of default” and further that
 25 they disputed the “agency relationship” between the beneficiary of the Deed of
 26 Trust and the loan servicer. (See, Complaint and Exhibit 5 thereto).

III. LEGAL STANDARD

Pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) a complaint may be dismissed if it appears beyond doubt that plaintiff can prove no set of facts in support of a claim which would entitle plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also, Gillespie v. Civiletti, 629 F.2d 637, 640 (9th Cir. 1980); De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978) cert. denied, 441 U.S. 965 (1979).

Federal Rule of Civil Procedure, Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662 (2009). “Threadbare recitals of a cause of action’s elements supported by conclusory statements” are insufficient to overcome a motion to dismiss. Id. at 1950. Moreover, “Rule 8(a)(2)...requires a ‘showing’, rather than a blanket assertion of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, n. 3 (2007) (citations omitted). If the “plaintiffs....have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” Twombly, supra, at 570; Iqbal, supra, at 680. To survive a motion to dismiss, the complaint must have non-conclusory factual content from which reasonable inferences can be drawn that are plausibly suggestive of a claim. Moss v. U.S. Secret Service, 572 F.2d 962, 969 (9th Cir. 2009). A court is not “required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

Further, a court is not limited to the allegations of the complaint in ruling on a motion to dismiss but can also consider any documents attached to the complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987); see also, Lee v. City of Los Angeles, 250 F3d 668, 688-89 (9th Cir. 2001). The court also may

1 take judicial notice of recorded loan and title documents, and their contents, if they
 2 are referenced in the complaint, and are thus deemed incorporated. FRCP Rule
 3 201, see also, Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on
 4 other grounds. Finally, when amendment would be futile, dismissal may be
 5 ordered with prejudice. Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996).

6 **IV. DISCUSSION**

7 **A. PLAINTIFFS ARE IMPERMISSIBLY FORUM SHOPPING.**

8 This is Plaintiffs' second lawsuit premised upon the same set of underlying
 9 facts. Plaintiffs' first lawsuit challenged the Assignments of Deed of Trust and
 10 other recorded documents, exactly as the case here. In that first lawsuit, Plaintiffs
 11 also admitted when they first began to experience financial difficulty, as well as
 12 the several years they applied (at first successfully, and thereafter unsuccessfully or
 13 in fact withdrew applications) for loan modifications. All of those facts are
 14 judicial admissions, which will be asserted against them in this lawsuit, and all of
 15 which disprove all of their claims here. Plaintiffs are simply forum shopping.

16 **B. PLAINTIFFS HAVE NO STANDING TO CHALLENGE THE** 17 **ASSIGNMENTS OF DEED OF TRUST OR THE SECURITIZATION** 18 **OF THE LOAN/NOTE AND FOR THAT REASON THE** 19 **NEGLIGENT MISREPRESENTATION AND SECTION 2924.17** **CLAIMS FAIL.**

20 The Complaint's third and fourth claims for relief are premised entirely upon
 21 the underlying allegations that the Assignments of Deed of Trust are void, and
 22 therefore Defendants have no interest in the Deed of Trust, Note or the Loan, and
 23 thus no rights and no standing to foreclose, negligently misrepresented that they
 24 did, and violated California Civil Code Section 2924.17 by recording an NOD
 25 when they had no ownership interest. Again, these are identical allegations to the
 26 prior State Court action.

27 The law is well settled regarding these types of allegations. Plaintiffs have
 28 no standing to challenge the Assignments of Deed of Trust, or the Substitution of

1 Trustee, and in turn the recorded Notice of Default and Notice of Trustee's Sale.
 2 All claims for relief of the Complaint are predicated upon purported defects in the
 3 securitization of the Note and assignment of the Deed of Trust. (See, e.g.,
 4 Complaint, page 3, paragraph 2 through page 10 paragraph 30). An assignment of
 5 a deed of trust or transfer of a note, however, merely substitutes one beneficiary
 6 and creditor (respectively) for another, without changing a borrower's obligations
 7 under the loan. Herrera v. Federal National Mortgage Assn., 205 Cal. App. 4th
 8 1495, 1507 (2012); Kan v. Guild Mortgage Company, ____ Cal.App.4th ____ (2014
 9 WL 5192710, p. 4) (2014). Therefore, any purported impropriety in the
 10 Assignments only affects the parties to the Assignments; not Plaintiffs. Id. See
 11 also, Warth v. Seldin, 422 U.S. 490, 499 (1975) ("a plaintiff generally must assert
 12 his own legal rights and interests, and cannot rest his claim to relief on the legal
 13 rights or interests of third parties."). This prudential standing consideration ensures
 14 that the party with the "appropriate incentive" to raise a challenge (or to choose not
 15 to) does so with "the necessary zeal and appropriate presentation." Kowalski v.
 16 Tesmer, 543 U.S. 125, 129-30 (2004); Osediacz v. City of Cranston, 414 F.3d 136,
 17 139 (1st Cir. 2005) (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)). Thus,
 18 Plaintiffs, a non-party to the Assignments or securitization of the debt, have no
 19 standing to enforce or attack the Assignments. Id.

20 Similarly, Plaintiffs lack standing to attack the securitization of the debt.
 21 Jenkins v. JPMorgan Chase Bank, N.A., 216 Cal.App.4th 497, 515 (2013); Kan,
 22 supra (WL 5192710 at p. 4.). Plaintiffs are an unrelated third party to the
 23 securitization of the Note and, therefore, cannot enforce or attack such agreements.
 24 Jenkins, supra, at 515. Plaintiff simply "may not assume the theoretical claims of
 25 hypothetical transferors and transferees" in order to assert causes of action against
 26 Defendants. Id.

27 Moreover, Plaintiffs cannot allege prejudice by such purported "invalid
 28 transfers" because their obligations under the Note and Deed of Trust remain

unchanged. See, Bernardi v. JPMorgan Chase Bank, NA, (N.D. Cal., 2012) 2012 WL 33894 at *2 (rejecting nearly identical allegations regarding securitization and standing to foreclose). Plaintiffs admittedly sought and obtained the loan, and agreed to repay it. Thus, they cannot allege prejudice as a result of the Assignment or securitization.

Further, California's foreclosure statutes (California Civil Code Sections 2924, et. seq.,) do not require the foreclosing parties to have physical possession of the Note and Deed of Trust. Shuster v. BAC Home Loans Servicing, LP, 211 Cal. App. 4th 505, 511-12 (2012); See also, Debrunner v. Deutsche Bank Nat. Trust Co., 204 Cal. App. 4th 433, 440-41 (2012). Further, as stated by the court in Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1154 (2011), "[s]ection 2924, subdivision (a)(1) specifically permits the 'trustee, mortgagee, or beneficiary, or any of their authorized agents' to institute foreclosure by recording a notice of default." Shuster, supra, at 512. It does not contemplate "a judicial action to determine whether the person initiating the foreclosure process is indeed authorized." Gomes, supra, at 1155.

Lastly, the Complaint appears to contain an allegation premised upon the case of Glaski v. Bank of America, 218 Cal. App. 4th 1079 (2013). (Complaint page 7, paragraphs 18 through 20). However, Plaintiffs have no standing under this case either. Glaski (decided upon New York Trust law) has been roundly criticized by many, many California Appellate Courts of all Districts, not followed by a single other California Appellate Court, and in fact outright rejected by many.

C. PLAINTIFFS' COMPLAINT DOES NOT ADEQUATELY PLEAD OR ALLEGE UNDERLYING FACTS TO SUPPORT A BREACH OF CONTRACT CLAIM FOR RELIEF.

"The standard elements of a claim for breach of contract are: '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom.'" Wall Street Network, Ltd. v. New York Times Co., 164 Cal.App.4th 1171, 1178 (2008). Moreover, "[o]ne party to a

1 contract cannot compel another to perform while he himself is in default.” Durell
 2 v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1367 (2010).

3 The Complaint does not plead sufficient facts to constitute a breach of
 4 contract claim for relief. Presumably, the contract upon which the claim is based is
 5 the Deed of Trust and its Note. (Complaint, page 12, paragraph 40). The
 6 Complaint asserts a breach of the terms of the Deed of Trust in that only the
 7 Lender or its assigns may direct a trustee to record a Notice of Default.
 8 (Complaint, page 12, paragraph 41 through page 13, paragraph 43). However, the
 9 recorded documents prove that the current beneficiary substituted Defendant
 10 Western Progressive, LLC as trustee, and Western Progressive recorded the Notice
 11 of Default and the Notice of Sale.

12 The Complaint also alleges that Defendants failed to provide 30 days notice
 13 prior to recording the Notice of Default, and references and in fact purports to
 14 quote paragraph 22 of the Deed of Trust. (Complaint, page 13, paragraph 45; page
 15 14, paragraph 48). But paragraph 22 of the Deed of Trust does not contain any
 16 such provision. Ordinarily, the allegations of the complaint must be accepted as
 17 true. However, this does not apply to allegations contradicted by the exhibits to
 18 the complaint or by matters of which judicial notice may be taken. Vance v. Villa
 19 Park Mobilehome Estates, 36 Cal. App. 4th 698, 709 (1995); see also, Frantz v.
 20 Blackwell, 189 Cal. App. 3d 91, 94-95 (1987); B & P Dev. Corp. v. City of
 21 Saratoga, 185 Cal. App. 3d 949, 953 (1986).

22 Similarly, allegations of false promises and detrimental reliance are not
 23 elements of a breach of contract claim for relief. These allegations are not part of
 24 any claims for breach of contract and therefore are improper. (Complaint, page 14,
 25 paragraph 47).

26 As to the allegations of violation of California Civil Code Sections 2924
 27 (Complaint, page 15, paragraph 51), these Sections are the exhaustive framework
 28 that governs non judicial foreclosures in California. This statutory scheme contains

no requirement that a party prove its power to foreclose by establishing it is the “Noteholder” or that an assignment of the deed of trust or securitization of a note was proper. I.E. Associates v. Safeco Title Ins. Co., 39 Cal. 3d 281, 285 (1985); Moeller v. Lien, 25 Cal. App. 4th 822, 830 (1994). “The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.” Moeller v. Lien, supra, 25 Cal. App. 4th at p. 830. Thus, Plaintiffs’ claim is legally baseless.

The court in Gomes v. Countrywide, 192 Cal. App. 4th 1149 (2011) was presented with an argument nearly identical to Plaintiff’s in the FAC. The court rejected Gomes’s contention:

[N]owhere does the statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized and we see no ground for implying such an action.

Id. at 1155.

Plaintiffs’ claims are no different from Gomes.

D. THE COMPLAINT’S CLAIM FOR RELIEF BASED UPON 15 U.S.C. SECTIONS 1681 ET SEQ FAILS.

1. The alleged evidence of “dispute” is not a credit reporting dispute.

In the second claim for relief, the Complaint contends failure to respond to a letter attached as exhibit 5 to the Complaint constitutes a violation under Section 1681. First, exhibit 5 does not challenge a “credit report” as defined by 15 U.S.C. Section 1681, and therefore is not a dispute governed by 15 U.S.C. Section 1681. See, 15 U.S.C. Section 1681a(d). Exhibit 5 contends that the recordation of the NOD and the Assignment of Deed of Trust is in error. (See, Complaint and Ex. 5,

1 page 2 attached thereto). This is not a credit reporting dispute under the Fair
2 Credit Reporting Act (the “FCRA”).

3 **2. Plaintiffs have no private right of action.**

4 Second, Plaintiffs have no private right of action under the FCRA against
5 either Defendant, and the Complaint pleads no facts that would support any.
6 Defendant Ocwen, as a servicer, is a furnisher of information to a credit reporting
7 agency. Defendant Western Progressive is a foreclosing trustee. See, Nelson v.
8 Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1059 (9th Cir. 2002).

9 Ordinarily, a credit furnisher has no liability under the FRCA to investigate
10 any claim made directly to it by any consumer. There is an exception carved out of
11 this such that a furnisher can only be sued under the FCRA if it does not respond to
12 a formal notice of consumer dispute received by the furnisher from a consumer
13 reporting agency. Arikat v. JP Morgan Chase & Co, etc. et al., 430 F. Supp. 2d
14 1013, 1023-24 (2006) (emphasis added) (citing 15 U.S.C. §§ 1681s–
15 2, 1681i(a)(2); Nelson, supra, at 1060); Virgen v. Mae, 2007 WL 1521553, at *4
16 and *8 (E.D. Cal. 2007); Rosciano v. Experian, et al., 2105 WL 163383, at *2 (D.
17 Az. 2015). That is, “[a] private right of action exists under 15 U.S.C. § 1681s–
18 2(b) only if the consumer informs a credit reporting agency of incorrect
19 information on the consumer's credit report and then the furnisher of the
20 information, upon receipt of notice from the *credit reporting agency*, fails to
21 conduct a reasonable investigation and report back to the credit reporting
22 agency.” Virgen v. Mae, WL 1521553, at *23–34 (E.D.Cal. May 23,
23 2007) (emphasis added).

24 Here, as noted above, the Complaint does not allege any improper credit
25 reporting information, nor does the Complaint allege that any credit reporting
26 agency ever contacted Defendant Ocwen to have Ocwen conduct a reasonable
27 investigation of Plaintiff's debt or that after such contact Defendant Ocwen failed
28 to conduct such an investigation.

1 More importantly, it is impossible for Plaintiffs to make any allegation that
 2 would meet the requisite pleading standards of a federal lawsuit. A Complaint
 3 must set forth underlying facts known by Plaintiffs, as allegations made upon
 4 information and belief must be disregarded. Bank of America NT &SA v.
 5 Williams, 89 Cal. App. 2d 29 (1948).

6 **3. Any FRCA claim is statutorily barred.**

7 Third, even if a correct claim, any such claim is barred by the applicable
 8 statute of limitations. In their State Court complaint, Plaintiffs admit that they
 9 began experiencing financial difficulty in April 2009, applied for and received a
 10 step loan modification, and thereafter over a period of four years applied for
 11 further loan modifications. Consequently, any alleged negative credit reporting
 12 would have started by April 2009. Applying for loan modifications from April
 13 2009 through at least June 2013, Plaintiffs would have been well aware of their
 14 credit status and any and all reports issued. Further the Notice of Default which
 15 recorded on January 28, 2014, and attached as Exhibit 6 to the Complaint,
 16 indicates that Patterson's loan was in default with a payment due for December 1,
 17 2012. Consequently, by no later than that 2012 date, there would have been credit
 18 reporting. 15 U.S.C. § 1681p.

19 **4. Any alleged credit reporting dispute is frivolous.**

20 Fourth, a credit reporting prohibition only relates to the reporting of
 21 inaccurate credit information. Other than to state that the loan has been reinstated
 22 (which statement is incorrect), the information reported is not inaccurate and
 23 Exhibit 5 provides no information to allow either the credit reporting agency or
 24 Ocwen to put any reported amounts in dispute or otherwise review or determine
 25 inaccuracy based upon your clients claims. See 15 U.S.C. Section 1681s-
 26 2(a)(1)(B). Moreover, as of the date of Exhibit 5, Plaintiffs were represented by
 27 counsel in their State Court Action. Lastly, Exhibit 5 cites to Paragraph 22 of the
 28 Deed of Trust as authority. But, as discussed above, Paragraph 22 of the Deed of

1 Trust relates to the issuance of a reconveyance when a loan has been paid in full.
 2 See, 15 U.S.C. Section 1681s-2(a)(8)(F).

3 **E. FINALLY, THE TILA CLAIM FOR RELIEF FAILS.**

4 The fifth claim for relief seeks to rescind the loan transaction, based upon
 5 Section 1635 of the Truth in Lending Act (“TILA”). The Complaint quotes TILA,
 6 that a borrower has a three day right to rescind a consumer credit transaction, and
 7 in this instance that would be the 2006 refinance loan. (Complaint, page 23,
 8 paragraph 96). The contention is based upon the allegation that the 2006
 9 transaction “never consummated.” (Complaint, page 25, paragraph 101). First,
 10 that three day right to rescind expired many years ago in 2006. Moreover, even if
 11 Plaintiffs had the right to rescind, as noted in the Complaint, they must repay all of
 12 the loan funds to Defendants.

13 Additionally, any other claim for TILA damages must be brought “within
 14 one year from the date of the occurrence of the violation.” 15 U.S.C. §1640(e). A
 15 claim for TILA rescission, on the other hand, is subject to a three-year statute of
 16 limitations or is cut-off by the sale of the property, whichever occurs first. 15
 17 U.S.C. §1635(f). “[A]s a general rule the limitations period starts at the
 18 consummation of the transaction.” King v. California, 784 F.2d 910, 915 (9th
 19 Cir.1986). Where a plaintiff alleges TILA violations during initial disclosures,
 20 equitable tolling is not appropriate if “nothing prevented [plaintiff] from
 21 comparing the loan contract, [the] initial disclosures, and TILA's statutory and
 22 regulatory requirements.” Hubbard v. Fidelity Federal Bank, 91 F.3d 75, 70 (9th
 23 Cir.1996) (citing King v. State of Cal., 784 F.2d 910, 915 (9th Cir.1986)). Here,
 24 Plaintiffs allege TILA violations occurring at Loan origination in 2006. Thus, all
 25 TILA claims are time barred.

1 **V. CONCLUSION.**

2 For all of the above reasons, Defendants respectfully submit that the
3 Complaint should be dismissed with prejudice.

4
5 Respectfully submitted,

6 **WRIGHT, FINLAY & ZAK, LLP**

7 Dated: July 24, 2015

By: /s/ Patricia L/ Penny

8 T. Robert Finlay, Esq.

9 Patricia L. Penny, Esq.

10 Attorneys for Defendant, WESTERN
11 PROGRESSIVE, LLC and OCWEN
12 LOAN SERVICING, LLC
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PROOF OF SERVICE

I, Jovete Elguira, declare as follows:

I am employed in the County of Orange, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 4665 MacArthur Court, Suite 280, Newport Beach, California 92660. I am readily familiar with the practices of Wright, Finlay & Zak, LLP, for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited with the United States Postal Service the same day in the ordinary course of business.

On July 24, 2015, I served the within **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED** on all interested parties in this action as follows:

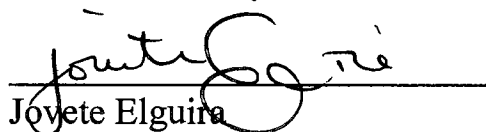
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☐ (BY MAIL SERVICE) I placed such envelope(s) for collection to be mailed on this date following ordinary business practices.

☒ (CM/ECF Electronic Filing) I caused the above document(s) to be transmitted to the office(s) of the addressee(s) listed by electronic mail at the e-mail address(es) set forth above pursuant to Fed.R.Civ.P.5(b)(2)(E).

☒ (FEDERAL) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 24, 2015, at Newport Beach, California.


Jovete Elguira